KELAPA SAWIT (TELUK ANSON) SDN. BHD.

v.

DR. YEOH KIM LENG & ORS.

SUPREME COURT, KUALA LUMPUR
HARUN HASHIM SCJ
AJAIB SINGH SCJ
MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 249 OF 1985]
2 NOVEMBER 1990

COMPANY LAW: *Family company - Shares issued on basis of monies lent to family company by shareholders' own companies - Additional shares issued to one family but not to other - Resolution not signed by directors - Whether null and void - Share certificates stamped prior to signature - Estoppel - Order for validation and rectification of company register - Just and equitable - Procedural compliance with Article of Association - Companies Act 1965, ss. 63, 162, 165.*

The appellant company, KS, is a family company, with the majority of shares held by the two brothers, YSH and YKH (the 2nd defendant D2); in addition YSH owned a company called PLT and YKH owned a company called JSC. Over the years, PLT and JSC had provided loans to KS in return for which they received shares by way of capitalization; PLT and JSC supplied fertilisers, transport and workers to KS. The chairman of KS was the Raja Muda of Perak and the managing director was initially YSH and currently YKP (YSH's nephew).

At an annual general meeting of KS on 23 March 1976, a resolution was passed whereby 719 shares were allotted to YSH's family at a premium of RM200 per share, based on an account standing to the credit of PLT; JSC also claimed a sum owed by KS and to this end, YKH proposed, at the extraordinary general meeting of KS on 6 December 1976, that the amount owed to JSC should be treated as fully paid up shares to be issued to him at RM200 per share also - this proposal was not carried.

Dissatisfied, YSH obtained on 24 January 1977 a circular resolution (the said resolution) under Article 54 signed by the Raja Muda YKH and YKH's son and YKL, who was also a director of the company. The said resolution approved the allotment of 369 shares to YKH and his family, in consideration of RM200 per share at a premium of RM100. The Raja Muda and YKH signed 5 share certificates for the 369 shares - the share certificates were already sealed and stamped when they were presented for the signatures above.

YKP then sought a declaration that the purported allotment of the 369 shares to YKH's family was null and void and that YKH's family deliver to KS the said share certificates for cancellation.

The defendants contended that:

(a) the allotment of the shares was valid and that the directors of the company had agreed to the allotment of the shares;

(b) as the share certificates were already executed, stamped and issued to them, KS was estopped from denying the validity of the shares

(c) the directors had authorised the company secretary, LSG, to issue the said shares.

The defendants also counterclaimed, if the allotment was held to be null and void, for an order validating the alleged impugned shares under ss. 63 and 355 of the Companies Act 1965 (the Act) and also for an order to rectify the register of the members of the company under s. 162 of the Act.

In the High Court, the claim of KS was dismissed and defendants counterclaim was allowed; hence this appeal. In arriving at this conclusion the trial Judge was satisfied that the allotment of the share was approved at the board of directors meeting of 15 December 1976 and that this was confirmed by LSG; YKH and YKL were not present at this meeting. However, having so decided, the learned Judge then held that as the issue of the shares was not signed by all the directors, they were not valid - also that KS was estopped from denying the truth of the representation in the certificates. In the result, having regard to s. 63 of the Act, he was satisfied on the facts that there was the intention to issue the shares to the defendants; he concluded it was just and equitable that the shares be validated. YKP had instituted a Civil Suit No. 424/82 against JSC in respect of the overcharging of the amount said to be owed by KS.

Held:

[1] The trial Judge's decision is a contradiction in terms as it boggles the mind how after finding that the allotment of shares was approved at the board of directors meeting and therefore valid, the Judge thought it necessary to make a reserve finding in respect of the circular resolution. It is elementary that a resolution passed at a board meeting with a quorum is valid for all times and does not depend for its validity on a further written resolution.

[2] (a) Under Article 54 of the Article of Association (AOA), a resolution may be validly passed without a board meeting provided it is signed by all the directors;

(b) The written resolution of the company dated 24 January 1977 ran foul of Article 54 as neither YKP nor his mother signed the resolution;

(c) In view of the requirements in Article 54, the said resolution was invalid and ineffectual because of the non-compliance thereof.

[3] There is no evidence that the provisions of Article 55 as to the procedure for the fixing of the seal were complied with. The legal consequence flowing from non-compliance with Article 54 and 55 is that the said resolution and the allotment of the shares could not be said in law to be the act of the company which binds the company, a nullity to be precise - *D'Arcy's* case. It also follows from this proposition that estoppel would not avail the respondents.

[4] In the present case the share certificates bore the seal of the company and the signature of the company's secretary when YKH received the written resolution and the certificates on 25 January 1977.

[5] Section 100(1) which provides for the certificate being *prima facie* evidence of title is applicable only if the certificate is validly issued in accordance with Articles 8, 51, 52, 53, 54 and 55; in this case there has been a violation of Articles 54 and 55 and as such, estoppel is not available to the defendants - what the company never did and what is not attributed to the company does not in law bind the company.

[6] Although it is only in a rare case that the appellate Court can disturb the finding of a trial Judge, it is necessary to determine by examination of the evidence adduced at the trial, whether the trial Judge's finding of fact that the decision to issue the said shares were approved at the company's board meeting on 15 December 1976 was justified:

(a) there is no such item recorded in the minutes of the board of directors meeting in Penang proof enough to show that the approval of the allotment of the shares to the respondents was never discussed nor obtained;

(b) it defies logic and common sense that LSG should have advised the secretary to act on the resolution and the issue of shares in flagrant violation of the company's rules;

(d) this evidence militates against the finding of the learned Judge on this point. Under the circumstances the Court is disposed to accept YKP's evidence which was substantiated by the unchallenged minutes of meeting of board of directors on 15 December 1976 in Penang; the finding of the learned Judge on this crucial issue is unsustainable for want of cogent evidence.

(d) therefore the allotment and issue of the disputed shares to the respondents on this account is also invalid.

[7] As to whether the allotment of shares could still be validated under s. 63 of the Act;

(a) there is a fundamental difference between acts which were technically not acts of the company and acts of the company which were irregular since it was a matter of degree only;

(b) if an act attributed to the company is not in fact and in law an act of the company it does not bind the company and is ineffectual whereas an act of the company which is irregular offers room for its regularisation or validation by application of the just and equitable principles embodied in s. 63;

(c) in applying the just and equitable principles in s. 63, the Judge is given a very wide discretion which must be controlled by certain criteria - if the criteria is not expressed within the section, then they must be derivative from a consideration of the policy of the section and the purpose which it is designed to achieve;

(d) s. 63 is designed to enable the Court to make good what is really a defective title to shares in a company using the words "defective title" in the quite non-technical sense and is directed to cases where it appears for some reason or other there has been an irregularity in the issue or the allotment which in strict law would result in the issue of the shares being, as the section says, "invalid". In those cases the section operates to enable a Judge to make an order which validates the proprietary interest which is apparently represented by the share certificate.

(e) There is nothing in the defendants' defence and counterclaim to render it just and equitable for the Court to exercise its discretion under s. 63 to validate the share certificates except perhaps the capitalization of indebtedness and its conversion into fully paid up shares on both sides of the Yeoh family, being the method by which shares were allotted to them in the past.

[8] As to the dispute of the actual amount owed to JSC, once the outcome of YKP's case against JSC is known then the capitalization could proceed but must be based on the amount owing to JSC as decided by the Court on the same basis as in the case of PLT. There is no reason for the Court to suspect that YKP in this respect will not honour his own solemn words on oath given in the High Court that he would agree to the allotment of shares and payment of dividend to the respondents.

[9] Under the circumstances this is not a proper case for the Court to exercise its discretion under s. 63 to validate the allotment of the 369 shares since the Court is in no position to verify the actual amount that is owing to the respondents and more importantly this matter is *sub judice.*

[Appeal allowed.]

Cases referred to:
Chong Sooi Chuan v. Yuen Lai Choon [1988] 2 MLJ 443
Dixon v. Kennaway and Co. [1900] 1 Ch 833
D'Arcy v. The Tamar, Kit Hill and Callington Railway Company LR 2 Ex 158
Gray & Farr Ltd. v. Carlile [1932] 1 DLR 391
In re Bonelli's Telegraph Company [1871] LR Vol XIL 246
In Re Fildes Bros. Ltd. [1971] WLR 592
Re Monitronix 12 ACLR 161
Re The Swan Brewery Co Ltd. (No. 2) 3 ACLR 168
South London Greyhound Racecourses Ltd. v. Wake [1931] 1 Ch 496
Siti Aishah binti Ibrahim v. Goh Cheng Hwai [1982] CLJ (Rep) 326
Millheim v. Barewa Oil & Mining [1971] WAR 65
Watt or Thomas v. Thomas [1947] AC 484
Yahya bin Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117

Legislation referred to:
Companies Act 1961 [Aust], s. 17
Companies Act 1965, ss. 63, 355, 100(1)

For the appellant - Sri Ram; M/s. Zainur & Maydien
For the respondents - Davidson; M/s. Azman Davidson & Co.

JUDGMENT

Mohd. Jemuri Serjan SCJ:

Kelapa Sawit (Teluk Anson) Sdn. Bhd, (the company) the appellant in this appeal, is a limited company incorporated in Malaysia in 1967 as a family company, the majority of whose shares are held by members of the families of two brothers, Yeoh Seow Hung and Yeoh Kheng Hooi. This company was primarily engaged in oil palm plantation. After the incorporation of the company, 1,200 shares were allotted, made up as follows: "300 shares each to Yeoh Seow Hung and Yeoh Kheng Hooi, Raja Muda of Perak and Toh Mohd. Razali.

Over the years, from time to time, shares were issued to the two families which were issued either as capitalization of loans or for debts owed to either one of the families' other companies. Both families also set up their own separate companies, Poh Lan Tobacco, belonging to Yeoh Seow Hung and Joo Siang & Co. to Yeoh Kheng Hooi. In 1971 900 shares were issued to Yeoh Seow Hung and 869 to Yeoh Kheng Hooi. However, in 1976 Toh Mohd. Razali transferred his shares to Yeoh Kheng Hooi group. In the same year another lot of 600 shares were allotted to Yeoh Seow Hung and 950 shares to Yeoh Kheng Hooi but in 1973, 100 of Yeoh Kheng Hooi's shares were sold to Yeoh Yoke Chew, the sister of Yeoh Kim Pong (PW1). Thus in 1974 both groups had equal shares of 900 each. In 1975, 200 shares were allotted to Yeoh Yoke Chin another sister, and 150 shares to Yeoh Yoke Chew by way of capitalization of the loans they provided to the company in the early days of its operation. In fact the two companies, Poh Lan Tobacco and Joo Siang & Co., helped the financing of the company by supplying fertilizers and transport as well as workers. The company started to have some production in 1973 and in 1974 it broke even. However, after 1974 profits began to come in.

At an annual general meeting of the company held on 23 March 1976 a resolution was passed whereby 719 shares were to be allotted to Yeoh Seow Hung's family based on an account standing to the credit of Poh Lan Tobacco as at the end of 1974. This allotment was at a premium of RM200 per share. The amount standing to the credit of Poh Lan Tobacco as at the end of 1974 was RM143,800. On the other hand, Joo Siang & Co. claimed as at 31 December 1974 a sum of RM73,909.06 was owed by the company, mainly for the supplying of fertilizers and transport and by 31 December 1975 the amount owing was RM122,805.91. Having regard to the allotment of shares by way of capitalization to Yeoh Seow Hung's family on 23 March 1976 Yeoh Kheng Hooi proposed at the extraordinary general meeting of the company held on 6 December 1976 that this amount should be treated as fully paid up shares to be issued to him also at the premium of RM200. This proposal was not carried for lack of a seconder. It was also claimed by Yeoh Kheng Hooi that the sum of RM122,805.91 was truly owed by the company as at 31 December 1975 which was reflected in the account of the company for 1975 and passed at that meeting.

Pausing here for a moment, it is fair to say that this was the root cause of the dispute between the two families that ended in this Court. When his proposal was rejected he was dissatisfied and felt aggrieved by what he regarded as an invidious decision of the meeting, considering that the previous allotment of 719 shares to Yeoh Seow Hung was agreed upon without dissent from him. It would seem that Yeoh Kheng Hooi expected a reciprocal approval on the part of the Yeoh Seow Hung's group on his proposal as was the practice of the company when Yeoh Seow Hung was still alive. In any event, on 24 January 1977 a circular resolution purportedly made under Article 54 of the Article of Association of the company was passed around for the signatures of the directors of the company. This resolution purportedly approved in consideration of RM200 per share at a premium of RM100, the allotment of 369 shares to Yeoh Kheng Hooi and members of his family. This circular resolution was duly signed by the chairman of the company, the Raja Muda of Perak, Yeoh Kheng Hooi himself and his son Dr. Yeoh Kim Leng the first respondent who was also a director of the company at that material time. 5 share certificates in respect of the 369 shares were signed by the Raja Muda of Perak and Yeoh Kheng Hooi. It is important to note that the share certificates were already sealed and stamped when they were presented together with the circular resolution for the signatures of the Raja Muda of Perak, Yeoh Kheng Hooi and Dr. Yeoh Kim Leng. It is also pertinent to mention here that on the incorporation of the company the chairman was the Raja Muda of Perak and the managing director was Yeoh Seow Hung who later resigned on 30 April 1975 owing to ill health. Yeoh Kheng Hooi thereupon took over as managing director but resigned on 17 March 1977. Yeoh Kim Pong, his nephew, took over as managing director since then.

On 15 September 1978 Yeoh Kim Pong on behalf of the company issued a writ averring that the directors' resolution dated 24 January 1977 purportedly made under Article 54 and allotting 369 shares to the defendants, was null and void. The company prayed for:

(a) a declaration that the purported allotment of the 369 shares made to the defendants was null and void, and

(b) an order that the defendants and each of them delivered to the company the said share certificates for cancellation.

In their defence the defendants averred, *inter alia*, that the allotment of the 369 shares was valid and that the directors of the company, including Yeoh Kim Pong himself, had already agreed to the allotment of these shares and therefore the directors' resolution of 24 January

1977 and Article 54 are immaterial and irrelevant. Because the share certificates were already executed, stamped and issued to them the company was estopped from denying the validity of the shares. The defendants also averred that the directors of the company had duly authorised the secretary of the company to issue the said shares through Dato' Lim Siong Guan of Messrs. Lim Siong Guan & Co. who at that time also acted as adviser, consultant, secretary and auditor to the company. The defendants also counterclaimed, in the event the allotment of the shares was null and void, for an order validating their allegedly impugned shares on the basis of s. 63 and s. 355 of the Companies Act 1965 and also for an order to rectify the Register of the Members of the company under s. 162 of the Companies Act.

The learned Judge dismissed the claim of the company but allowed the defendants' counterclaim and ordered the issue of shares to the defendants be validated under s. 63 of the Companies Act and that the register of the members of the company be rectified accordingly. In arriving at this decision the learned Judge held that there was evidence before the Court that the decision to issue the 369 shares to the defendants was made by the board meeting of the directors held in Penang on 15 December 1976. The learned Judge also found as a fact that Dato' Lim Siong Guan (PW2) confirmed this decision. It was Dato' Lim Siong Guan who, having been acting as adviser to the Raja Muda of Perak, advised the company's secretary to issue the share certificates after he was approached by Yeoh Kheng Hooi to issue them. He claimed that he would not have issued those certificates unless he was satisfied that everything was in order. The learned Judge, therefore, surmised from this premise that the issue of the shares was properly decided by the board of directors at its meeting in Penang. However, after making this finding, curiously and enigmatically, as it seems to us, the learned Judge went on to say that as the issue of the shares was not signed by all the directors they were not valid. (See p. 8 of his judgment). Obviously this finding is a contradiction in terms. It boggles the mind how after finding that the allotment of the shares to the defendants was already approved at the board of directors meeting and therefore valid, the learned Judge thought it necessary to make another, but reverse finding in respect of the circular resolution. It is elementary that a resolution passed at a board meeting with a quorum is valid for all times and does not depend for its validity on a further written resolution made under Article 55.

Notwithstanding this apparent invalidity, the learned Judge found that the certificates gave rise to estoppel and the company therefore was estopped from denying the truth of the representation contained in the certificates against anyone relying on them, including the person to whom the certificates were issued, citing the case of *Dixon v. Kennaway and Co.* [1900] 1 Ch 833. In the result, having regard to s. 63 of the Companies Act and that he was satisfied on the facts that there was the intention to issue the shares to the defendants, he concluded it was just and equitable that the shares be validated.

Viewed from the perspective of the company's case as pleaded in the statement of claim, and the learned Judge's finding on the invalidity of the circular resolution, conveying the approval to allot the 369 shares to the defendants, the judgment should have been found in favour of the company and the declaration sought would have been granted but for the defendants' averments in their defence.

Directors can only exercise their powers collectively by passing resolutions at board meetings, unless the articles otherwise provide and this is generally understood by those who are familiar with company law and practice. See Article 51 which provides that directors may meet together for the dispatch of business of the company in pursuance of Article 42.

However, a resolution of the company may be effectively and validly passed without a board meeting provided it is signed by all the directors. See Article 54. Under Article 8 the shares of the company shall be under the control of the directors who may allot and dispose of the same to such persons on such terms and in such manner as they may determine. The case of *Gray & Farr Ltd. v. Carlile* [1932] 1 DLR, 391 and *D'Arcy v. The Tamar Kit Hill, and Callington Railway Company* LR 2 Ex. 158 provide us with clear illustration of the operation in practice of these Article of Association.

The written resolution dated 24 January 1977 in pursuance of which the 369 shares were purportedly allotted and issued to the defendants obviously ran foul of Article 54 of the Articles of Association of the company which stipulates that a resolution in writing signed by all the directors shall be as valid and effectual as if it had been passed at a meeting of directors duly constituted. On the evidence, neither Yeoh Kim Pong nor his mother, Madam Beh Swee Hong, signed the resolution because according to him he never saw the resolution in the first place and only came to know about it from Albert Lim, the new secretary of the company after the meeting of the board of directors on 17 March 1977 in Ipoh (see pp. 28, 30 and 32 of the record of appeal). That was the first time he saw the resolution. This evidence was corroborated by the letter dated 10 March 1978, written by the secretary of the company to the Registrar of Companies where he stated the circular resolution contained three signatures when it was finally returned to him. Two directors refused to sign the resolution, thereby indicating their disapproval to the allotments. The chairman then called for a board meeting for a decision but it was never discussed at the annual general meeting as the audited accounts were referred to the extraordinary general meeting. (See p. 178 of the record of appeal).

In view of the requirements in Article 54, the resolution, therefore, was invalid and ineffectual because of the non-compliance thereof. See *In re Bonelli's Telegraph Company* [1871] LR Vol. XIL 246. In *Re Monitronix* 12 ACLR 161 an application was made under s. 122 (1) of the Companies (W.A.) Code to validate the purported issue and allotments of shares because the directors never met for the purpose of the allotments of shares and, besides, the resolutions were not signed by all the current directors of the company concerned. The issue on the validity of the approval and the resolution was not specifically decided but it was implicit that the validation order sought was because of the invalidity of the resolutions. It is observed that s. 63 of our own Companies Act 1965 is in *pari materia* with s. 122(l) of the Code.

In the present case it was clearly and indisputably established that the share certificates bore the seal of the company and the signature of the company's secretary when Yeoh Kheng Hooi, the second respondent, received the written resolution and the certificates on 25 January 1977. Under Article 55 of the Article of Association it is provided that the seal shall never be affixed to any document except by the express authority of a resolution of the directors and in the presence of one director and of the secretary or such other person as the directors may appoint for the purpose; and that the director and the secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence. As the share certificates were sent around together with the written resolution for the signatures of all the directors of the company, and were signed only by the chairman, Yeoh Kheng Hooi and Dr. Yeoh Kim Leng, the provisions of Article 55 were not thereby complied with. It would appear that the secretary had affixed the seal of the company on to the share certificates even before the written resolution was signed. There was no evidence that the seal was affixed in accordance with Article 55. The legal consequence flowing from non-compliance with Article 54 and 55 is that the resolution and

the allotment of the shares could not be said in law to be the act of the company, a nullity to be precise, and thereby bind the company. See *D'Arcy's* case (*supra*). It also follows from this proposition that estoppel would not avail the respondents.

Similar finding was made by Clauson J in the case of *South London Greyhound Racecourses Ltd. v. Wake* [1931] 1 Ch. 496 where the certificate bore the seal of that company and was attested by the signatures of the director and the secretary respectively without any authority from the board of the company. Clauson J at p. 507, went so far as to say that the document must be taken to be a forgery. In that case the principles laid down in *Ruben v. Great Fingall Consolidated* [1906] AC 439 were followed. In the latter case it was held that a company was not bound by a document to which the seal had been affixed without authority and on which the signatures of the attesting directors were forged.

Under s. 100(l) of the Companies Act 1965 a certificate under the common or official seal of a company specifying any shares held by any member of the company shall be *prima facie* evidence of the title of the member to the shares. In our view, this section has effect only if the certificate is validly issued in accordance with Article 8, 51, 52, 53 and 54 and affixed with the seal of the company in accordance with Article 55. In the present case since the company had succeeded in establishing that the resolution was invalid and the seal of the company was affixed without authority, in both cases in flagrant violation of Article 54 and 55, respectively, s. 100 does not apply in much the same way and for the same reasons estoppel does not avail the respondents. What the company never did and what is not attributed to the company does not in law bind the company. As for *Dixon v. Kennaway & Co.* (*supra*) which was cited by the learned Judge in his judgment it can be distinguished on the facts of that case. In that case the purchase of the shares by the plaintiff was approved by the board of directors, the registration of the transfer of the shares ordered by the board and the certificates were duly and validly signed by the director and countersigned by the secretary. The validity of the certificates was never in issue at all and the Court correctly ruled that the certificates under the seal of that company estopped the company from denying the title of a person who has accepted and acted on the certificates. In that case estoppel clearly applied. See pp. 837 and 842 of the report of that case.

The plaintiffs' case would have ended on this finding but, having regard to the defence pleaded by the defendants referred to earlier on in this judgment, it is pertinent to refer to the finding of the Judge on that defence. At p. 6 of his judgment the learned Judge says:

> Having regard to the evidence before the Court I am **satisfied that the decision to issue 369 shares to Yeoh Kheng Hooi was made and approved at the company's board meeting held in Penang in December 1976**. This is confirmed by Dato' Lim Siong Guan (PW2) who had been acting as adviser to the late Raja Muda of Perak, who was one of the directors of the plaintiff's company. Dato' Lim said that he had advised the company's secretary to issue the share certificate after he was approached by Yeoh Kheng Hooi (second defendant) to issue the certificate. He said he would not have issued the certificate unless he was satisfied that everything was in order.
>
> **I take that to mean that the issue of the shares to the plaintiffs was properly decided upon by the board.**

At p. 7 he repeated the same finding as follows:

> There is **I think evidence that the issue of the 369 shares was discussed at Penang and that it was decided to allot the shares to the defendants**. The intention to issue the shares to the defendants is clearly shown by Yeoh Kheng Hooi's (second defendant) **evidence which is corroborated by the evidence of Dato' Lim Siong Guan.**
> (The emphasis is ours).

Basically the learned Judge was entirely satisfied that the board of directors at its meeting in Penang on 15 December 1976 had agreed to allot shares to the defendants. The question that has to be answered is whether in fact there is evidence to justify the finding of fact by the learned Judge. It is generally accepted that an appellate Court should not disturb the finding of a trial Judge who had the advantage of seeing the witnesses and evaluating their credibility unless it can be shown that he had failed to use or palpably misused his advantage. See *Chong Sooi Chuan v. Yuen Lai Choon* [1988] 2 MLJ 443, a Supreme Court decision, and *Siti Aishah binti Ibrahim v. Goh Cheng Hwai* [1982] CLJ (Rep) 326 per Abdul Hamid (FJ as he then was at p. 328) where he quoted the Privy Council decision in *Yahya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117:

> that it is only in a rare case that 'the Appellate Court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial Judge on the question of credibility.'

We also bear in mind, in this regard, the speech of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484, 487:

> III. The Appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the Appellate Court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

In the present case it is necessary for us to determine by examination of the evidence adduced at the trial whether the finding of fact by the learned Judge could be justified. Was there any evidence at all that the approval for the capitalization of the company's indebtedness to Joo Siang & Co. was discussed and that the 369 shares should be allotted to the respondents at the board of directors meeting in Penang on 15 December 1976?

It was not disputed that Yeoh Kheng Hooi and Dr. Yeoh Kim Leng, were not present at the board of directors meeting in Penang on 15 December 1976 which was presided by the Raja Muda of Perak and attended by Yeoh Kim Pong (PWl), his mother, Madam Beh Swee Hong, and Dato' Lim Siong Guan who was in attendance on behalf of the secretary of the company. During his cross-examination Yeoh Kim Pong denied that the question of capitalization was ever discussed at that meeting. In fact according to him the matter was never raised at all. Dato' Lim Siong Guan on the other hand testified that there was a discussion on the allotment of the shares but there was no agreement on it. Again in his cross-examination he stated that there were discussions at the board meeting in Penang but later on he contradicted himself on this issue when he said:

> It is possible that the board meeting in Penang decided to issue the circular resolution. There was no discussion according to the minutes of the meeting. I cannot recall whether there was discussion over the matter.

In his re-examination he took yet a different position on this issue by stating that at the meeting at Penang on 15 December 1976 there was no such discussion. It was not mentioned in the minutes which he himself took down. If it was discussed he would have put it down in the minutes. In this respect the relevant minutes of the board of directors meeting in Penang assumes great significance and we have subjected it to a close scrutiny. These minutes corroborate Dato' Lim Siong Guan on the question of allotments of the shares. Certainly

there is no such item recorded in the minutes proof enough to our satisfaction that the approval of the allotment of the shares to the respondents was never discussed and obtained thereat. We have no way of telling whether the minutes left out, by design or by inadvertance, the mention of the discussion on the subject on which no agreement was reached, if in fact, there was such discussion. While we accept the relevant minutes on its face value, we are still left with the nagging feeling that Dato' Lim Siong Guan adopted an ambivalent attitude on this crucial issue either on account of some ulterior motives of his own or of his defective memory due to his advanced age. His performance as a witness does not strike us as impressive and his evidence on the whole must be taken with a grain of salt.

An account of what happened after the meeting in Penang was given by Dato' Lim Siong Guan in his examination-in-chief. He stated that he remembered on a few occasions early in 1977 the then chairman came and advised him to ask the secretary to issue the shares and as far as he could remember it was a personal request. He advised the secretary to issue the certificates as a result of the approach to him by Yeoh Kheng Hooi because he had no reason to distrust him as the managing director and because he was a respectable person in Teluk Anson. On the other hand, according to Yeoh Kheng Hooi he wrote a letter dated 21 January 1977 to the secretary of the company to request him to issue to him and members of his family 369 shares because he said, Dato' Lim Siong Guan told him to do so. As a result the circular resolution was issued on the same day and sent to him together with the share certificates which were already sealed and signed by the secretary. Perhaps, this is the aspect of the evidence of Yeoh Kheng Hooi that the learned Judge said was corroborated by Dato' Lim Siong Guan. Yeoh Kheng Hooi explained how this strange episode came to pass thus. After the board meeting in Penang Dato' Lim Siong Guan telephoned him to tell him that if he agreed to capitalize up to 31 December 1974 then he would have to write a letter to the secretary and shares would be allotted to him and members of his family (see p. 43 of the record of appeal).

No articulated explanation was forthcoming from Dato' Lim Siong Guan other than what we have adverted to earlier, how in the face of Articles 8, 51, 52, 53 and 54 he could have advised the secretary to issue the circular resolution of 21 January 1977 and issue the disputed share certificates. Is not, after all, Dato' Lim Siong Guan, a public accountant responsible for the incorporation of the company, closely associated with it since its incorporation, adviser to the chairman and on many occasions often did he not act as secretary of the company? He is expected to be familiar with the basic requirements of company law and practice. Surely, under these circumstances it defies logic and common sense that he should have advised the secretary to act on the resolution and the issue of shares in flagrant violation of the company's rules. The only rational explanation for Dato' Lim's action was his infructuous anticipation that all the directors would sign the circular resolution. If this evidence has any merits at all then it demolishes the contention that the approval of the allotment of the shares to the respondents was made at the board of directors meeting in Penang. This evidence militates against the finding of the learned Judge on this point. We are under the circumstances disposed to accept Yeoh Kim Pong's evidence which was substantiated by the unchallenged minutes of meeting of the board of directors on 15 December 1976 in Penang and hold that the finding of the learned Judge on this crucial issue is unsustainable for want of cogent evidence. In the result the allotment and issue of the disputed shares to the respondents on this account is also invalid. We had already ruled on the invalidity of the circular resolution dated 24 January 1974 earlier on.

The next crucial question for our determination is whether the allotment of the shares which were made in violation of the Article of Association could still be validated under s. 63 of the Companies Act. It was urged upon us by learned Counsel for the respondents that there was no justification for making a hard and fast distinction between acts which were technically not acts of the company and acts of the company which were irregular since it was a matter of degree only. We regret we are unable to accept this proposition. In our view there is a fundamental difference between the two acts. If an act attributed to the company is not in fact and in law an act of the company it does not bind the company and is ineffectual whereas an act of the company which is irregular offers room for its regularisation or validation by application of the just and equitable principles embodied in s. 63. See *Millheim v. Barewa Oil & Mining* [1971] WAR 65. Burt J at p. 67 has this to say:

> That then brings us back to a consideration of s. 63 and in particular to the question as to whether, in all the circumstances, it is just and equitable to make an order validating the issue. It is in itself a difficult question, turning upon the distinction between an act which was purported to be done by the company but was done incorrectly, or in a way which is irregular and which produces an invalidity, on the one hand, and a case where an act is done which is not really an act of the company at all, on the other hand.

We fully endorse this observation.

In this case the allotment of shares to the applicant was on the face of it the act of the Barewa company but that as a fact at the material time that company had no directors. It had no one who was authorised to issue or allot shares on its behalf. The Judge dismissed the application under s. 63 giving as reasons therefore that the company was under investigation it would not directly solve practical problems which remained unsolved and the applicant failed to make up a case within the terms of s. 63. On the other hand, in another Supreme Court of Victoria case of *Re The Swan Brewery Co Ltd.* (No. 2) 3 ACLR 168 the Supreme Court of Victoria applied the just and equitable principles and ordered the validation of the shares which were issued to three subsidiaries of the company. The shares issued to the subsidiaries of the Brewery company was invalid because it infringed s. 17 of the Companies Act 1961, and held to be so by Gillard J. However, since the invalidity of the issue and allotment of the shares to the subsidiaries would be detrimental to a large number of people who had acted *bona fide* and without notice of the invalidity and since, however, it would be impossible to identify with any kind of certainty the persons involved or the shares comprised in the invalid issue and allotment by the persons by whom they were held, it was just and equitable to make an order validating the issue to the subsidiary companies. The point to note in this case is that the act of the Brewery company was authorized but the allotment of the shares to its subsidiaries was invalid because of s. 17.

In *Re The Swan Brewery Co Ltd.'s* case, Gillard J exercised his discretion to validate the allotment of shares to protect the interest of the innocent share-holders, in spite of the fact that he had already declared invalid the allotment to the three subsidiary companies of the Brewery company for an infraction of s. 17 of the Companies Act. At p. 174 of the report he said that he had weighed in the balance the questions of business morality as opposed to the pragmatic approach of validating the title which, at that time was of no value to very many innocent people. He found that the claims of the latter were so overwhelming that whatever uneasy feelings he might entertain about the business morality of what was done were far outweighed by such claims so that he was called upon to assist the victims of the invalid allotments that were done under bad advice to the relevant law. On the other hand Burt J in *Millheim's* case considered that there was stringent limitation to his discretion. However, he offered certain guidelines for applying the just and equitable principles in s. 63.

At p. 67 the learned Judge said:

> We find in many statutes power being given to Judges to do what is just and equitable in all the circumstances, but without otherwise providing the criteria of either justice or equity. It does not follow from that, the Judge can do exactly what he likes. Clearly he is given a very wide discretion, but it is a discretion which must be exercised in a judicial way, and hence, must in the end be controlled by certain criteria. If the criteria be not expressed within the section, then they must be derivative from a consideration of the policy of the section and the purpose which it is designed to achieve.
>
> For myself I think s. 63 is designed to enable the Court to make good what is really a defective title to shares in a company using the words "defective title" in the quite non-technical sense.
>
> It is directed to cases where the shares have been issued, which represent a bundle of rights proprietary in character and valuable in terms of money, and where it appears for some reason or other there has been an irregularity in the issue or the allotment which in strict law would result in the issue of the shares being, as the section says, "invalid".
>
> In those cases the section operates to enable a Judge to make an order which validates the proprietary interest which is apparently represented by the share certificate.

We agree with Burt J's observation and adopt it for the determination of this appeal. The two cases clearly show that the just and equitable principles may be applied differently from one case and another depending very much on the circumstances of each particular case. This approach is very familiar to everyone concerned with the administration of justice. We are left in no doubt the circumstances in both cases were different from each other and different rationales were applied to justify the validation in the *Re The Swan Brewery Co.'s* case and the refusal to do so in *Millheim's* case. In the present case the grounds upon which we were asked to apply the just and equitable principles to validate the allotment of the 369 shares to the respondents were pleaded in paras. 2 and 3 of the defence which compendiously can be stated as follows:

> The share certificates were duly issued and sealed with the seal of the company and signed by two directors and the secretary in compliance with Article 8 and 55 of the Article of Association. The allotment of the shares had already been approved by the directors of the company, including Yeoh Kim Pong before the issue of the circular resolution which together with Article 54 became immaterial and irrelevant. The plaintiff, therefore, was estopped from denying the validity of the share certificates. Besides, except for the Raja Muda of Perak who was the chairman of the company on its incorporation, it was a family company and managed by the Yeoh family. More importantly the shares of the company had been allotted to the share-holders in the two groups of the Yeoh family on the basis of goods and services and other material considerations, such as payment of labourers supplied to the plaintiff. The shares had been allotted in consideration of a debt owed by the plaintiff to Joo Siang & Co. which supplied fertilizers.

(See para. 5 of the defence under "counter claim".)

We have already discussed and dealt with each of these grounds and have found on evidence that there are no merits in them. Estoppel does not operate under the circumstances of this case in favour of the respondents and neither does s. 100 apply because the allotment of the shares and the affixation of the seal of the company were not the acts of the company. There was no approval to allot the disputed shares at the meeting of the board directors in Penang. These are in our view not proper and valid grounds or criteria for us to exercise our discretion to validate the impugned share certificates. There is nothing in these grounds to

render it just and equitable for us to exercise our discretion under s. 63 to validate the share certificates except perhaps the capitalization of indebtedness and its conversion into fully paid up shares on both sides of the Yeoh family, being the method by which shares were allotted to them in the past.

Learned Counsel for the respondents raised the question of the quasi-partnership character of the company to attract the application of just and equitable principles for the purpose of validating the allotment of the said shares. He cited the case of *In re Fildes Bros. Ltd.* [1971] WLR p. 592 (Ch.D.). We need to say only briefly on this point. The facts of that case are in no way similar to the present case. It concerned two brothers who owned in the company 499 shares while the wives owned one each. The brothers were at all material times the only directors of the company, one being the chairman with a casting vote both on the board and at meetings. The chairman was also in complete control of the management of the company but at the board table the brothers were equal, subject always to the chairman's casting vote. There was an allegation that there was an agreement on the incorporation of the company that the profits should be divided equally between them. It would seem that besides the Articles of Association the relationship of the two brothers with regard to the management of the company was governed by certain contracts. Megarry J who heard the case did not make any specific finding whether the company could be regarded as a quasi-partnership company. In dealing with a petition to wind up the company by the other brother who was not the Chairman, the learned Judge refused the application to wind up. At p. 596 the learned Judge says:

> In the present case, the articles do not have much bearing on what I have to decide: but as it is the contract between the parties which is of importance, then it seems to me that one must have regard not merely to what the articles say, but also to what the parties are shown to have agreed in any other manner. It cannot be just and equitable to allow one party to come to the Court and require the Court to make an order which disregards his contractual obligations. The same, I think, must apply to a settled and accepted course of conduct between the parties, whether or not cast into the mould of a contract.

We therefore do not think that this case is relevant to the present appeal because the company was managed in a somewhat professional manner and more so it seems when the younger Yeoh took over the office of managing director of the company, much to the disconcert of the older Yeoh.

Apropos the capitalization of the indebtedness of the company to Joo Siang & Co. to which the company had raised objection we have the evidence of Yeoh Kim Pong himself who had unequivocally declared his stand on this issue. He had made the assurance that consonant with the company's practice of capitalising indebtedness of the company to both Poh Lan Tobacco and Joo Siang & Co. in the past, he would not object to it. He would agree to the allotment of shares and the payment of dividends to the respondents. The reason he objected to the allotment of the disputed 369 shares was because he disputed the actual amount that was owed by the company to Joo Siang claiming that there was overcharging of fertilizers on the part of Joo Siang & Co. We pause here to interpolate that the learned Judge also made the same observation in his judgment in this respect. See p. 5 of the judgment. On account of this he had to take the stock book on 28 February 1977 in order to verify Joo Siang & Co.'s claim. Accordingly he had instituted a Civil Suit No. 424/82 against Joo Siang & Co. in respect of the overcharging. Once the outcome of the case is known then the capitalization could proceed but must be based on the amount owing to Joo Siang as decided by the Court on the same basis as in the case of Poh Lan Tobacco. (See Yeoh Kim Pong's evidence at pp. 25 - 29 of the record of appeal).

There is no reason for us to suspect that Yeoh Kim Pong in this respect will not honour his own solemn words on oath given in the High Court to deprive the respondents of what is due to them once the High Court has made a decision on the Civil Suit case No. 424/82. By the same token the respondents' right to the allotment of shares by capitalization is assured on these solemn words. Since the matter is now pending hearing in the High Court the respondents must in the meantime exercise the virtue of patience. Under the circumstances we do not think this is a proper case for us to exercise our discretion under s. 63 to validate the allotment of the 369 shares since we are in no position to verify the actual amount that is owing to the respondents and more importantly this matter is *sub judice*. It would, in our opinion, be proper to let justice take its own course and the litigating parties abide by the decision of that civil suit when it is finally disposed of by the Court. In the result we would allow this appeal with costs here and below and grant the order in terms of the prayer in Civil Suit No. 379 of 1978.

Also found at [1991] 1 CLJ 433